No. 89-1937 (2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

QUANTUM CHEMICAL CORPORATION,
Petitioner,

v.

DISTILLERY, WINE & ALLIED WORKERS INTERNATIONAL UNION, LOCAL UNION NO. 32, AFL-CIO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case involves an action filed by respondent Distillery, Wine and Allied Workers International Union, Local Union No. 32 ("the Union" or "Local 32") under 29 U.S.C. § 185 to compel petitioner National Distillers and Chemical Corporation ("National Distillers" or "the Company") to arbitrate a grievance.[1] National Distillers had refused to arbitrate the grievance on the grounds that the Union's collective bargaining agreement was not with National Distillers, but with an administrative di-

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[1] Petitioner changed its name to Quantum Chemical Corporation during the proceedings in this case, and has filed this petition under its new name. Since Petitioner was named National Distillers throughout the events at issue in this case and throughout the proceedings in the courts below, this brief will refer to Petitioner as National Distillers.

vision of the Company that the Company had recently sold. The Union contended that National Distillers was bound by the collective bargaining agreement since it was a single entity with its division when the agreement was entered and since it had retained control over the work which was the subject of the grievance.

A. Statement of Facts [2]

1. Prior to May 26, 1987, National Distillers operated a distillery and an adjacent research facility in Cincinnati, Ohio. The two facilities were located on either side of an interstate highway and were connected to each other by a footbridge over the highway. Pet. App. B2; J.A. 279.

National Distillers operated these facilities through two administrative divisions, the National Distillers Products Company Division ("the Liquor Division") and the USI Chemical Company Division ("the Chemical Division"). Neither administrative division was separately incorporated or otherwise had any status as a distinct legal entity under state law. The research facility was generally operated within the Chemical Division and the distillery was operated within the Liquor Division; however, since the 1950s, all maintenance, janitorial, and lawn care work at the research facility was performed by employees administratively assigned to the Liquor Division. Pet. App. A2, B2. J.A. 281-282.

For many years, the Union represented a bargaining unit of National Distillers' employees performing a variety of jobs at the distillery and performing the main-

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[2] This statement of facts is taken from the statements of undisputed fact in the opinions below and from undisputed parts of the affidavits and exhibits submitted to the District Court with the Union's motion to compel arbitration. These submissions were included in the Joint Appendix submittted to the Court of Appeals. Following the practice of Petitioner, citations to that Joint Appendix are signified as "J.A. ——".

tenance, janitorial, and lawn maintenance work at the research facility. This bargaining relationship generated a series of collective bargaining agreements between the Union and "National Distillers Products Co.—Division of National Distillers & Chemical Corp.". The most recent of these agreements extended from May 1, 1985 to April 30, 1988. Pet. App. B2; J.A. 9.

2. The 1985 collective bargaining agreement contained explicit provisions protecting bargaining unit members from the loss of any bargaining unit work.[3]

Over the years, National Distillers fully recognized that the research facility's maintenance, janitorial and lawn maintenance work was bargaining unit work clearly covered by the Local 32 contract, and Company attorneys had characterized the Company as a unitary employer of those performing this work.

Thus, in a 1981 arbitration, the Company's attorney stressed that the contract covered this research facility work and that the two divisions involved in this work were part of a single entity:

> The maintenance employees of U.S. Industrial Chemicals Company [(the Chemical Division)] are under the same collective bargaining agreement as those working at the National Distillers Products property [(the Liquor Division)], and of course

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[3] *First*, the agreement declares that "[p]ersons excluded from the bargaining unit shall not be permitted to perform any work normally performed by employees in the bargaining unit, which employees now perform or have performed in the past." J.A. 16 (Article I, § 3); *see* Pet. App. B2.

Second, the agreement provides that "[n]o such work . . . belonging to employees within the bargaining unit shall be contracted out to, or performed by, any other employer or employees except upon due consultation with the Union. Any disagreement not satisfactorily resolved shall be subject to arbitration." J.A. 26 (Article XVI); *see* Pet. App. B2.

Third, the agreement is made explicitly "binding upon the parties and their assigns." Pet. App. B2; *see* J.A. 32 (Article XXVII).

> both National Distillers Products Company and USI are divisions of National Distillers & Chemical Corporation. [J.A. 228, 366 (discussed at Pet. App. A6).] [4]

And, in his deposition, a National Distillers' industrial relations manager stated that the work was sufficiently integrated for "Research" to be considered a bargaining unit "department" under the Local 32 contract. Pet. App. A6; J.A. 289.

3. On April 8, 1987, National Distillers entered into an Asset Sale Agreement under which the distillery and other properties of the Liquor Division were sold to James B. Beam Distilling Company ("Jim Beam") and under which Jim Beam agreed to be bound by the 1985 collective bargaining agreement with the Union. The sale was closed May 26, 1987.

The research facility was not part of the sale, and that facility continued to be owned and operated by National Distillers. Pet. App. A2, B2-B3; J.A. 99, 230-231, 303.

After the sale, however, National Distillers stopped using bargaining unit employees for the research facility's maintenance, janitorial and lawn maintenance work, and began using non-union companies for this work. All the bargaining unit employees at the research facility were ordered to report to the distillery and commence work for Jim Beam. As a consequence of National Distillers refusal to continue to use bargaining unit workers

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[4] Similarly, in a 1983 arbitration, the Company's attorney stated:

> There's no question but that the Company operates a large distilling, rectifying operation on both sides of I-75. There is no question but that Local 32 represents employees on both sides of I-75. There's no question but that Local 32's personnel work in the so-called research or U.S.I., where Henderson works, as well as the distillery and rectifying parts across the way. There's further no question but that persons move from one side of I-75 to the other, and with frequency. [J.A. 228, 374-375.]

at the research facility—and of the transfer of the research facility workers to the distillery—less-senior bargaining unit workers at the distillery were terminated or demoted.

To gain relief for these workers, and to protest the failure of National Distillers to continue to use bargaining unit members to perform bargaining unit work, the Union, on June 3, 1987, filed a grievance with National Distillers. The grievance stated as follows: "[O]n 5-29-87 all union research employees were removed from the plant (25 jobs). Their work is being performed by non-union employees. Their current contract does not expire until 4-30-88." Pet. App. A2-A3. *See also* Pet. App. B3.

4. On June 5, 1987, National Distillers refused the grievance, returning it to the Union on the grounds that National Distillers no longer had a Liquor Division and its Chemical Division had no agreement with the Union. Pet. App. A3, B3; J.A. 86. In response, the Union filed a charge with the Regional Director of the National Labor Relations Board ("NLRB") alleging *inter alia* that National Distillers had refused to bargain in good faith in violation of § 8(a)(5) of the National Labor Relations Act ("the NLRA"), 29 U.S.C. § 158(a)(5). Pet. App. A3, B3; J.A. 197. The Regional Director refused to issue a complaint. J.A. 198.

On July 17, 1989, the Union filed this action in District Court under § 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185, which provides for federal district court jurisdiction in "[s]uits for violation of contracts between an employer and a labor organization."

B. Statement of the Proceedings Below

1. After the close of discovery, the District Court granted the Union's motion to compel arbitration.

At the outset, the District Court recognized that "[w]hether a collective bargaining agreement creates a duty for the parties to arbitrate a particular grievance is an issue [of law] for the court." Pet. App. B4 (*citing AT&T Technologies v. Communications Workers*, 475 U.S. 642 (1985)). The court also recognized that the issue of arbitrability must be decided apart from any consideration of "the merits of the underlying claim." *AT&T Technologies, supra*).

The District Court then considered the Union's contention that National Distillers "is not an entity separate from its administrative divisions, and therefore was a signatory to the contract between its Liquor Division and the local union." Pet. App. B4. The District Court agreed with the Union that National Distillers and its divisions, were a single employer and that therefore "National Distillers was a party to the collective bargaining agreement by virtue of its relationship to the employer signatory to that contract (the Liquor Division of National Distillers)." Pet. App. A5-A6.

2. On appeal, the Sixth Circuit unanimously agreed that National Distillers and its two divisions must be considered one entity for purposes of the agreement to arbitrate this sort of dispute. Pet. App. A3-A5.

In reaching this conclusion, the court below discussed the "single employer doctrine" which the NLRB had formulated for determining when legally distinct entities should be treated as unitary employers. Pet. App. A5 (*citing Radio & Television Broadcast Technicians v. Broadcast Service*, 380 U.S. 255, (1965)). Stressing that the test "depends on the circumstances of the case taken as a whole," the court assessed the relevant undisputed facts here and found "single employer status." Pet. App. A5.

First, the court concluded that National Distillers' structure justified the conclusion that the Liquor and Chemical Divisions had been under common ownership and management. Pet. App. A5. *Second*, the court focused on the substantial interchange of employees between the divisions to find a significant "interrelationship of operations." *Id.* *Third*, the Sixth Circuit found common labor relations control over the work at issue, emphasizing that (a) the two divisions were under common control *at the time of the contract's negotiation*, (b) the text of the agreement and its prior interpretations made clear that the agreement governed the labor conditions of the research facility positions in question, and (c) in prior arbitrations National Distillers' lawyers had implicitly treated the two divisions as "part of a single entity." Pet. App. A5-A6.

ARGUMENT

The instant petition devotes itself almost entirely to arguments that the court below erred. We will show that petitioner's assertions of error are wholly without basis; moreover, the fact-dependent issues raised here simply have no importance beyond this case.

I. PETITIONER'S FIRST QUESTION MISCHARACTERIZES THE DECISION AND RECORD BELOW

Petitioner's principal argument is that the Court of Appeals decided this case on the basis of "the NLRB's 'single employer' theory," and that—because this theory "was not raised, briefed or argued prior to the decision" —petitioner was denied the ability to formulate legal and factual arguments "on the theory before it was applied." Pet. 7-8.

From beginning to end, this argument is frivolous.

A. The notion that this Court should review and reverse the judgment of a court of appeals because that

court conducted relevant legal research beyond the specific legal doctrines and cases cited in the parties' briefs and arguments has no support in law or reason. Petitioner's contention is *not* that it had no notice of the general legal claims at issue: from the outset the Union openly contended that National Distillers was "a single entity" and that its divisions had "no separate entity status." Brief of Plaintiff-Appellee, *Distillery, Wine and Allied Workers v. National Distillers*, Sixth Circuit No. 89-3265 ("Union Appeals Br."), at 10. *See also* J.A. 212 (same argument made in Union's district court brief). Rather, Petitioner's contention is that—although it knew the Union's general "single entity" theory of the case—Petitioner had no way of knowing that the NLRB's law on "single entity" status might be important.

We submit that it is wholly without substance to contend that a court of appeals' examination of relevant—though not specifically cited—federal precedents constitutes such reversible error as to require this Court's plenary review.[5]

B. Petitioner's argument is also *untrue as a matter of fact.* The Union had supported its "single entity" theory with citations both to general corporate law and *federal labor law*, arguing that National Distillers must be considered a unitary entity under all of these sources. Among the federal cases cited and discussed were cases which specifically examined the NLRB's "single employer" doctrine and the NLRB's closely related "alter

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[5] The only case cited by Petitioner in support of its theory of error is *Morgan v. United States*, 304 U.S. 1, 18 (1938). *See* Pet. at 8. The petitioner in *Morgan* was not simply complaining of "surprise" at a decisionmaker's reliance on publicly available precedents that had not been specifically cited—as is the Company here—rather, the *Morgan* petitioner complained of the complete absence of any notice prior to an administrative hearing of what the nature of the administrative charges to be heard would be.

ego" doctrine. And, indeed, the Sixth Circuit's discussion of "single employer" doctrine relies in part on one of the "single employer" cases cited in the Union's brief and on other cases which were cited and discussed in the case which the Union had cited. *See* Pet. App. A4-A5; Union Appeals Br. at 14-15; J.A. 214-215 (Union's district court brief).[6]

C. The utter lack of merit to Petitioner's contention that it was given no notice of the NLRB's "single employer" doctrine is demonstrated by Petitioner's own court of appeals' reply brief. In that brief, Petitioner explicitly recognized that the Union had relied on the NLRB's "single employer" doctrine, but then cavalierly dismissed that doctrine as irrelevant. *See* Reply Brief of Defendant-Appellant, *Distillery Wine & Allied Workers Union v. National Distillers*, Sixth Circuit No. 89-3265 ("Company Appeals Reply Br."), at 2 n.1.[7]

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[6] The Union's briefs below specifically relied on two federal cases which had elaborated and discussed the NLRB's "single employer" doctrine. One of those cases, *Crest Tankers v. NMU*, 796 F.2d 234, 237-238 (8th Cir. 1986), extensively discussed the NLRB's "single employer" and "alter ego" doctrines and explained their relevance to the issue of when "an employer which has not signed a labor contract may be so closely tied to a signatory employer as to bind them both to the agreement." The other case, *NLRB v. Borg Warner Corp.*, 663 F.2d 666, 668 (6th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982), reviewed an NLRB finding of "single employer" and "alter ego" status for various legally separate entities. *See* Union Appeals Br. at 14-15; J.A. 214-215.

The Sixth Circuit's discussion of NLRB "single employer" doctrine relied in part on *Crest Tankers*, and relied further on *Carpenters v. Pratt-Farnsworth*, 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983), and *Radio & Television Broadcast Technicians, supra*, both of which are prominantly discussed in *Crest Tankers*. *See* Pet. App. A4-A5; *see also Crest Tankers, supra*, 796 F.2d at 237.

[7] In this footnote, the Company asserted that cases like *Crest Tankers* and *Borg Warner* were irrelevant because the instant case involves "neither . . . [an] alter ego nor single employer" situation.

II. PETITIONER'S SECOND QUESTION IS AN EFFORT TO REARGUE THE PARTICULAR FACTS OF THIS CASE AND PRESENTS NO ISSUE OF RELEVANCE BEYOND THIS CASE

A. Petitioner's second question presented (*see* Pet. 9-16) asserts that the Sixth Circuit drew improper inferences from the particular facts of this case with the result that the court below gave undue weight to certain of the factors relevant in determining "single employer" status. *See* Pet. 12 (criticizing court below for insufficiently "detailed factual analysis" of single employer factors) *id.* (court gave "grossly inadequate consideration" to various factors); Pet. 12-16 (rearguing factual inferences).

Petitioner's contention in this regard raises no issue of federal law that goes beyond the particular facts of this case, and thus no issue worthy of consideration by this Court. And, as we now show, Petitioner's criticisms of the decision below are once again without merit.

B. Petitioner relies for its criticism of the Sixth Circuit decision on three cases, which are cited for the proposition that "two operating entities [which] are both divisions of the same corporation [may be] separate employers" under federal labor law. *See* Pet. 11-12 (*citing Local 391, IBT v. NLRB*, 543 F.2d 1373, 1376 (D.C. Cir. 1976), *cert. denied*, 430 U.S. 967 (1977); *AFTRA v. NLRB*, 462 F.2d 887, 892 (D.C. Cir. 1972); *Los Angeles Newspaper Guild, Local 69*, 185 NLRB 303, 305 (1970), *enf'd*, 443 F.2d 1173 (9th Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972)). Petitioner's reliance on these cases is entirely misplaced.

These cases do not say that administrative divisions *must* be treated as separate employers. Nor do they deny that an entity's status as an unincorporated administrative division is a factor militating *against* separate employer status. They stand only for the proposition that

divisions *may* be treated as separate employers, *where the totality of the relevant circumstances supports such treatment.* The facts in this case are far different from those in the three cited cases, and the facts here clearly support the Sixth Circuit's finding of *single* employer status.

In finding "separate employer" status, the three cited opinions all stressed that there had been *no* regular interchange of employees betwen divisions and *no* involvement of one division in the subject matter of the labor dispute at the other division. *See, e.g., Local 391, IBT, supra.* 543 F.2d at 1374 ("no line of advancement for employees between divisions . . . no interchange of employees between divisions"); *AFTRA v. NLRB, supra,* 462 F.2d at 891-892 (no employees at one division represented by union at issue); *Los Angeles Newspaper Guild, supra,* 185 NLRB at 304 ("no transfer of employees among divisions"). The same cannot be said of this case, which involves a contract that was signed by officials of the Company and that was intended to govern and preserve jobs that were (a) always subject to joint control by the two divisions of the Company, (b) were always staffed by employees moving from one division to another, and (c) were now being eliminated by that part of the Company claiming to be a stranger to the contract.

Given this context, the court of appeals reasonably focused on job interchange and common control over the shared work, factors which were not present in the cases cited. *See* Pet. App. A5-A6. This was precisely the proper analysis.[8]

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[8] A recent article on the NLRB's single employer doctrine stresses another major difference between the three cases cited by Petitioner and this one. Each of the cases cited involved secondary boycott charges aginst a union for picketing "neutral" divisions of companies during disputes with other divisions of those companies. The Board has been far more demanding before finding single employer status in such secondary boycott cases than it has been in other cases, because of "the strong congressional policy favoring

III. PETITIONER'S THIRD QUESTION MISCONSTRUES THE CONCEPT OF DEFERENCE TO THE NLRB

Petitioner closes its petition with an argument that the court of appeals erred in not "giv[ing] considerable deference" to the Regional Director of the NLRB who had not issued a complaint on the Union's NLRA § 8 (a)(5) charge. Pet. 16. Petitioner urges such deference on the basis that the NLRB is generally entitled to deference regarding its authoritative interpretations of the NLRA. Pet. 17.

In making this argument, Petitioner entirely ignores that, whatever deference may be owed to the NLRB when the Board authoritatively construes the Act, no analogous deference is owed an NLRB Regional Director when he informally investigates factual matters and exercises his wide discretion not to issue a complaint. *See Vaca v. Sipes*, 386 U.S. 171, 182 & n.8 (1967) (NLRB General Counsel has "unreviewable discretion to refuse to institute . . . complaint" and may exercise this discretion despite legal wrongs suffered by individual parties).

First, a refusal to issue a complaint is *not* an authoritative decision on the merits by the Board. *See Thomas v. Consolidated Coal Co.*, 380 F.2d 69, 77-78 & n.12 (4th Cir. 1967) ("a refusal by the [General Counsel of the]

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the protection of neutrals in labor disputes." Befort, *Labor Law and the Double-Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Revision*, 1987 Wisc. L. Rev. 67, 76 (citing *AFTRA*, 185 NLRB 593, 598, 600 (1970), *enf'd*, 462 F.2d 887 (D.C. Cir. 1972), which emphasizes importance of secondary boycott issue to single employer analysis).

Petitioner's exclusive reliance on secondary boycott cases here—*viz.*, in an arbitration context—is thus particularly inappropriate, since in *this* context particularly strong public policies *favor* a "single employer" finding. *Cf. Steelworkers v. Warrior & Gulf Navigation*, 363 U.S. 524, 582-83 (1960) (presumption should be in favor of interpreting contracts to support arbitration).

National Labor Relations Board to file a complaint is not a final decision on the merits"); *Teamsters Local 290 v. Schilling*, 340 F.2d 286 (5th Cir. 1965) "mere refusal by the General Counsel to issue a complaint is not necessarily based on the evidence or the merits").

Second, while the NLRB has primary authority to construe the NLRA, it has no authority superior to that of the courts in the area of construing and applying collective bargaining agreements, and certainly a single NLRB Regional Director has no such superior authority. *Cf. Vaca v. Sipes, supra*, 386 U.S. at 182 & n.8; *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962).

Although Petitioner asserts error here, it cites absolutely *no* authority supporting the novel theory of deference that it asserts. Thus, once again, Petitioner's proffered question is wholly unworthy of this Court's plenary consideration.

CONCLUSION

For the reasons stated, this Court should deny the petition for writ of *certiorari*.

Respectfully submitted,

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